IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No._____

PAUL FRANZ FREDERICK, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinion of the Court

The opinion of the Court below has not been officially reported. It is dated December 15th, 1944, and appears at pages 214, 215 of the Record. On page 7 the decision is set out in full.

Statement of the Case

This has already been stated in the preceding Petition on pages 1-6, which is here adopted and made a part of this brief. The facts and issues therein stated will be elaborated only to the extent thought helpful.

Specifications of Error

The Circuit Court of Appeals erred:

I.

In holding that the conviction was supported by sufficient evidence, particularly because of that Court's finding of fact that " * * * THE EVIDENCE LEAVES US WITH MORE DUBIETY THAN CERTAINTY."

II.

In holding that this conviction was not contrary to law, particularly in view of that Court's holding * * * "WE ARE NOT THE ONLY ONES UNIMPRESSED WITH THE CASE AS MADE AGAINST THE DEFENDANT."

III.

In holding that the Government, by competent and relevant proof, discharged its burden of proving every essential element of the crime charged by substantial evidence excluding every other hypothesis than that of Petitioner's guilt, notwithstanding its finding that "THE CASE IS SUGGESTIVE OF A WITCH HUNT * * * "

IV.

In holding that the Government discharged its burden of clearly establishing that Petitioner was guilty of a fraudulent representation concerning a material fact with knowledge of its falsity and with intent to deceive.

V.

In holding that this conviction was sustained by competent and relevant proof beyond a reasonable doubt, notwithstand-

ing the Circuit Court found, as a fact, * * * "THE EVIDENCE LEAVES US WITH MORE DUBIETY THAN CERTAINTY."

IV.

In holding that this conviction was not obtained by the use of admissions before the alleged crime,—was corroborated —and that the necessary elements of the charge were clearly established.

Summary of Argument

1) The indisputable evidence shows that Petitioner purchased a Poll Tax Receipt for himself and wife on December 27th, 1941, as was required of all property owners, irrespective of citizenship or lack of it, under the Constitution and Statutes of the State of Texas, and in so doing he was but fulfilling a mandatory requirement of the laws of that State.

2) PETITIONER, IN PRESENTING THE POLL TAX RECEIPT (IF HE DID), DOES NOT CONSTITUTE, AS A MATTER OF LAW, REPRESENTATION OF CITIZENSHIP.

The evidence clearly shows that Petitioner, assuming that he actually presented a Poll Tax Receipt (which the Court below unequivocally states "LEAVES US WITH MORE DUBIETY THAN CERTAINTY.") did not constitute a WILLFUL INTENT TO REPRESENT HIMSELF TO BE A CITIZEN.

3) PROOF IS INSUFFICIENT.

The evidence in this record, as to both Counts, fails utterly to show that Petitioner in the purchase of the Poll Tax Receipt violated any law, and that he at any time, ever represented himself to be a citizen, the absence of which leaves no

room for doubt that the conviction on both Counts, is not sustained.

4) CONVICTION ON BOTH COUNTS IS NOT SUSTAINED BY COMPETENT PROOF BEYOND A REASONABLE DOUBT.

The Circuit Court held (R. 214-215), that *"The case is suggestive of a witch hunt"* * * * *"The evidence leaves us with more dubiety than certainty.* * * * " *"we are not the only ones unimpressed with the case as made against the Defendant."*, that being so, the conviction is not justified since the proof did not exclude every reasonable hypothesis of innocence, and proof of guilt *beyond a reasonable doubt* is lacking.

5) UTTER LACK OF EVIDENCE.

The evidence in the record fails utterly to show that Petitioner violated the Statute in question, or any other law. There was no evidence of any kind, either direct or indirect, that Petitioner ever represented himself to be a citizen. The affirmative evidence shows that he registered as an alien on December 5th, 1940 (R. 83), and as an enemy ailen, on February 12th, 1942 (R. 90-91). No shred of evidence indicated "guilt" by Petitioner. The record wholly fails to sustain the conviction.

ARGUMENT

Point I

The interpretation of Title 8, Sec. 746, Subdiv. 18, presents an important question which should be settled by this Court.

Petitioner was indicted for violation of Title 8, Sec. 746,

Subdiv. 18, in that he "represented" himself to be a citizen of the United States for the purpose of obtaining a Poll Tax Receipt, required by the Constitution and Statutes of the State of Texas (Arts. 2959-2977, 7046, VERNON'S CIVIL STATUTES OF THE STATE OF TEXAS ANNOTATED). By motion timely made during the course of the trial (R. 8-11), adverse ruling on which was excepted to (R. 11-12) and assigned as error (Ass. 2, 7, 8, 9, 10, R. 30-32), Petitioner challenged the interpretation of the Statute on which the indictment rested. Petitioner contended that as owner, jointly with his wife, of property in the State of Texas, he was required, under the laws of that State to purchase a Poll Tax Receipt, irrespective of his citizenship. That the possession of such Poll Tax Receipt, and the procurement thereof, constituted a mere compliance with the laws of the State of Texas, and evidence of his having purchased a Poll Tax Receipt. He further contended that the mere possession of such Poll Tax Receipt did not, as a matter of law, constitute "Representation" that he was a citizen of the United States.

This purchase, in compliance with the State laws of Texas, has now been adjudicated criminal on the ground that the procurement and possession of Poll Tax Receipt is tainted, and constitutes a false "Representation" as to citizenship. The representation (if such was made), it will be observed, had nothing whatever to do with the requirement of the Petitioner to secure a Poll Tax Receipt under the laws of the State of Texas.

Point II

The issue raised by the challenge of the sufficiency of the evidence of "representation" warrants review by this Court.

We freely acknowledge that ordinarily this Court will not

review decisions of Circuit Courts on the sufficiency of the evidence—at least where no Constitutional issue exists. We urge, however, that the unusual circumstances present in this cause are sufficient to justify a departure from that practice.

The Court below finds as a fact that "The case is suggestive of a witch hunt," "the evidence leaves us with more dubiety than certainty," " * * * we are not the only ones impressed with the case as made against the Defendant," but affirms the conviction in utter disregard of the law.

The Government seeking conviction on the First Count which involves the purchase of the Poll Tax Receipt (Dec. 27th, 1941) relied on but a single witness. The Deputy Tax Collector of Harris County, Texas, Mrs. Bennita Blissard, stated that people were "ten or twelve feet deep at the windows and there are about fifteen windows there, you can imagine how noisy it is," at the time Petitioner presented himself, to purchase Poll Tax Receipts for himself and wife. She says, "At this point I didn't say, are you a Naturalized citizen of the United States. I merely raised my eyes and said 'You are naturalized?', and he said 'yes'." But in the next question this witness says that when she asked Petitioner the question "you are naturalized?" "he nodded his head" (R. 46). A neighbor who states that she has known Petitioner for eight years, and has often visited in his home, says that she *knows* the Defendant "has difficulty hearing at times, due to an impediment in his hearing." "He is not entirely deaf, but he has great difficulty in hearing" (R. 198, 204). This deafness is quite obvious in the record, he does not hear his attorney's questions, and has to have them repeated (136, 140, 145). Nowhere else in the testimony does anybody say that Petitioner ever represented himself as a citizen of the United States. On the contrary, numerous witnesses testified that he has always told them he was *not* a citizen. He registered as an alien on December 27th, 1941 (R. 83), and

as an enemy alien on February 12th, 1942 (R. 90-91). The statement of witness Marks (R. 96-97) that Petitioner once told him that he (Petitioner) was a citizen, and exhibited a Poll Tax Receipt to prove it, is obviously a mistake on the part of Marks. This, because witness Marks alleges this to have occurred April 3rd, 1941, whereas, the Government admits that the first Poll Tax Receipt Petitioner ever bought was December 27th, 1941.

The entire weight of the conviction on the First Count rests on the testimony of witness Blissard. A fair and impartial scrutiny of her testimony necessitates the conclusion that it looks more like her representing Petitioner as a Naturalized Citizen to save herself trouble, than Petitioner representing himself as a citizen. Apparently she put him down as naturalized in order to save time and trouble. Or at the very worst, she did ask him whether he was naturalized, and he did not hear or understand what she was saying. But against her testimony are these facts:

(a) She would have to testify as she did so as not to seem inefficient as Deputy Tax Collector;

(b) She would have to testify as she did so as to avoid showing herself to be a perjurer in the former trial;

(c) She did not know Frederick personally and could not have identified him in a crowd (R. 53-58). The whole affair occurred over two years prior to the trial; yet she remembered all the circumstances of her writing a Poll Tax Receipt for this unknown man. Such a memory is incredible!

The fact that he purchased a Poll Tax Receipt, the mere buying of it, is of no significance. Petitioner's statement that a tax official had told him he had to buy it (R. 139, 148, 149) is undisputed. Furthermore, even an alien is required to buy a Poll Tax in the State of Texas, if he owns property in that State.

The fact that the record leaves room for doubt that wit-

ness Blissard actually understood Petitioner to say that he was a citizen, or whether Petitioner, who is slightly deaf, actually heard witness Blissard's question as to his naturalization, if she asked it, adds strength to the finding of the Circuit Court of Appeals that "the evidence leaves us with more dubiety than certainty."

A fair and impartial survey of all of the testimony necessitates the conclusion that the testimony did not exclude the hypothesis of innocence. Therefore, proof of guilt beyond a reasonable doubt was lacking and Petitioner's Motion for a directed verdict on this expressed ground (R. 8-11) should have been sustained. The exception to this ruling (R. 12) was duly preserved (Ass. 2, 7, 8, 9, 10; R. 30-32).

The law on the subject is clear and uniformly adopted. Recent applications are found in WARSZOWER v. U. S., 312 U.S. 342; U. S. v. CLASSIC, ET AL., 313 U.S. 299; FOTIE v. U. S. (8 Cir.), 137 Fed. (2d) 831; U. S. v. SILVA (2 Cir.), 109 Fed. (2d) 531; RIVERA v. U. S. (1 Cir.), 57 Fed. (2d) 816, and BOATRIGHT v. U. S. (7 Cir.), 105 Fed. (2d) 737.

The Second Count in the indictment sought to show that Petitioner "represented" himself as a citizen by actually voting in the School Trustee Election of April 4, 1942, in Houston, Texas. Again, the Government relies on a single witness to establish this charge. This witness, Mrs. Blevins, says that Petitioner *never* represented to her that he was a citizen (R. 77-79). That Petitioner merely handed the Poll Tax Receipt to her (R. 184-185). Nobody else saw Petitioner at the Polls that morning; nobody else saw him vote. Petitioner himself never said that he voted. He says only that "my wife says I voted at an election for School Trustees about one year ago and I guess I did, held at Jack Price's Filling Station on Market Street" (R. 109).

The charge is *not* that he *voted unlawfully*, but that he represented himself as a citizen unlawfully. There is no testi-

mony that Petitioner did anything else than present his Poll Tax. He did not represent himself as anything at all. As to whether Petitioner presented himself to vote, we have only Mrs. Blevins' word that he was there. Nobody else saw Petitioner there, and he never admits that he was there or was not there. He says that he "doesn't recall," but that his wife says he was there (R. 154-156). Petitioner merely states that he brought a lot of people there to vote, and doesn't remember whether he voted or not. (The election was held two years before the trial.) Witness Blevins and Petitioner were on opposite sides in a bitter neighborhood squabble and she may be trying to hurt him out of pure maliciousness (R. 178-179; 74). The Poll Tax receipt showing he voted (if he did) was never presented in evidence; and there is no evidence except witness Blevins' word that Petitioner actually did appear to vote at this election.

In the absence of all direct evidence that Petitioner presented his Poll Tax receipt at the School Trustee Election, except the word of Mrs. Blevins (who is admittedly a political enemy of Petitioner) it is not certain that Petitioner actually voted in the School Trustee election of April 4, 1942.

The pertinent portion of the Statute for the purpose of this inquiry is as follows:

> "It is hereby made a felony for any alien or other person, whether an applicant for naturalization or citizenship, or otherwise, and whether an employee of the Government of the United States or not
>
> * * * knowingly to falsely represent himself to be a citizen of the United States without having been naturalized or admitted to citizenship, or without otherwise being a citizen of the United States."

This Statute obviously contemplates the presence of wilfulness before conviction can lawfully be obtained. And

"wilfulness" necessarily implies a purposeful design to commit an act with fraudulent or evil purpose. U. S. v. MURDOCK, 290 U.S. 389, 394. Also, SPIES v. U. S., 317 U.S. 492, 497, 498.

It is elementary that criminal statutes may not be stretched so as to embrace acts and conduct not within their scope. And no such thing exists as a constructive crime. FASULA v. U. S., 272 U.S. 620, 629.

The Government in the Court below admits that "it is not unlawful to buy a Poll Tax or to vote, but that is not what this case is about. The essence of this case is the unlawful claim to citizenship by an alien for any purpose." (Appellee's brief, Circuit Court of Appeals, page 9.)

It is respectfully submitted that no proper inference of guilt is permissible under the record in this cause, and that the Circuit Court was eminently correct in holding "the evidence leaves us with more dubiety than certainty." And we might add that said Court stated the crux of this prosecution in its holding, "The case is suggestive of a witch hunt." For the record in this cause, we submit, demonstrates that it is just another unfortunate illustration of ancestry being substituted for the essential ingredients necessary to a lawful conviction.

Point III

The refusal of the Circuit Court of Appeals for the Fifth Circuit to follow decisions in this Court and in other circuits on the necessity for applying the fundamental law of the land, in criminal cases, requires review by this Court.

The Circuit Court in this cause has expressly refused to follow the fundamental law of the land, to-wit: That before Petitioner can be found guilty upon either Count in the in-

dictment every material allegation must be proved "beyond a reasonable doubt."

The Circuit Court has stated without equivocation that "The case is suggestive of a witch hunt * * * "; "the evidence leaves us with more dubiety than certainty"; "we are not the only ones unimpressed with the case as made against the Defendant," that Court having expressly found that the evidence created more doubt than certainty, it was the duty of the Court below to reverse such conviction. This we believe to be the proper view, the only view consonant with those high principles of justice which the Federal Courts are charged to administer.

The Circuit Court of Appeals in sustaining the conviction of Petitioner notwithstanding that it found "the evidence leaves us with more dubiety than certainty" departed from our long established traditions of Anglo-American Law, which require in every case that it be proven that a crime was actually committed, and that his guilt is established "beyond a reasonable doubt".

See: U. S. v. CLASSIC, ET AL., 313 U.S. 299; WARSZOWER v. U. S., 312 U.S. 342 and FOTIE v. U. S. (8 Cir.), 137 Fed. (2d) 831.

The decision of the Circuit Court is in conflict with the sound and universal rule, that before a person may be found guilty, guilt must be established "beyond a reasonable doubt." The decision in this case is indeed the first expression of a rule of law never even suggested before. We confess our inability to find any other cases, State or Federal, which throw light on this problem. Therefore, a review by this Court is essential lest the patent uncertainty created by the decision below result in confusion. The expressed findings embodied in the decision of the Circuit Court relieves us of further comment in the premises. The decision speaks for itself! To our Courts, the refuge of weakness and innocence, we look with hope and

joy. It has never been decided by any Court that a criminal conviction will stand when "the evidence leaves us with more dubiety than certainty." Certainly, this is not the voice of Justice. And it is not mere rhetoric to predict that should this decision stand, future generations may justly pronounce it a relapse into the realm of Cimmerian darkness.

This decision negates every segment of our Democratic institutions, and strikes a very serious blow to the Constitutional rights of defendants in criminal cases. It is highly dangerous to disregard such rights at any time. At this particular time of our history, to abandon them would be suicidal.

For the reasons before stated, Petitioner earnestly urges that this Court grant its Writ of Certiorari directed to the Circuit Court of Appeals for the Fifth Circuit and relieve this Petitioner from the unjust burden to which he is subjected by the terms of the judgment entered against him by said Court.

Conclusion

It is respectfully submitted that the Writ of Certiorari prayed for in the Petition should issue.

Respectfully submitted,

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